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No. 91-1341

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE

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No. 91-1341

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OCTOBER TERM, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, and DAVID HEMENWAY,

Petitioners,

v.

THANH VAN VO, MILLARD F. OTTMAN, JR., DAVID C. ROSEMAN, JONES, DAY, REAVIS and POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING AND MARKETING COMPANY, INC.,

Respondents.

Petition For The Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE VIETNAMESE COMMUNITY OF WASHINGTON, D.C., MARYLAND AND VIRGINIA, IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.1, .2 and .4 of the Rules of this Court, the Vietnamese Community of Washington, D.C., Maryland and

Virginia respectfully moves for leave to file the annexed brief amicus curiae in support of appellants. Respondents have refused consent for the filing of this brief.

INTEREST OF THE AMICUS CURIAE

The Vietnamese Community of Washington, D.C., Maryland and Virginia is the major Vietnamese-American organization for the Washington, D.C. Metropolitan area and the surrounding states. It is a non-profit organization dedicated to the preservation and promotion of the welfare of Vietnamese citizens and residents of this great Country. Its members by and large know first hand what it is to have to deal with and live under totalitarian domination and the importance of constitutional safeguards and the Rule of Law in preserving individual liberties in the face of officials determined to ignore such rights and impose the rule of fiat. Its membership ex-

ceeds forty thousand Vietnamese and, through a working alliance with similar organizations in all the other States of the Union it is representative of over one-million Americans of Vietnamese origin or ancestry.

Heretofore, the Vietnamese-Americans, and Pacific and Asian-Americans generally, have not been active in filing Amicus Curiae briefs before the Court or in making known their concern about the rising tide of incidents in which discrimination against Asian-Americans, often in connection with their operation of small businesses, is coming to the attention of the larger American public. No doubt that is part of the reason why the actions leading to this present petition occurred. The Vietnamese Community hopes that beginning now, with this case, this indifference to the civil rights of the Asian-Americans in this country, Americans

who are justly famed for their achievements in academia, in business and in many other fields, ends. The Community looks forward to filing many more briefs in support of such righteous causes as this until unfortunate incidents such as those that occurred here are exposed to the great good will of the American people and ended by observance of the rights of Asian-Americans along with all other Americans in the courts, not only of the Nation's Capital, but all over this land.

The Community is concerned with the instant petition because, unless it is heard and the decisions below overruled there will be a clear signal that in the national capital, of all places, the civil rights of Asian-Americans specifically granted as a shield against the misuse of the power of the states for the purpose of depriving individuals of their rights under the Federal Constitution and laws will

be abridged and ignored with impunity in the very courts themselves, courts that are held out to all who come here as the safeguards of our liberties and our sacred right to own a piece of the American dream through hard work and sacrifice.

The dream of Dr. Martin Luther King was that of an America where all Americans, regardless of their skin color or heritage, could walk, work and prosper side by side. His weapons were the non-violent protest and the use of the courts to enforce the civil rights laws that give freedom and dignity to all Americans. Sadly, for the Asian-American community, and for the Vietnamese-American community in particular, the course of this case of Thanh Vong Hoai is a corruption of that dream, a betrayal of its vision, a disappointment to those who look to the courts with hope that the laws will indeed be elevated above status, above estab-

lished position and above the mundane politics of Washington, D.C. What happened in this case is an elevation of the rationalization of "managing" those who are not perceived as important because of their political and ethnic affiliation out of sight and out of mind,[1] of treating them as invisible so that their rights may be ignored without discomfort to a system that fools itself that it is observing those rights.

What is evident throughout this case is that if Mr. Hoai had been allowed to have his case heard and have the constitutionality of Superior Court Rule 12-I (b) as it stood in September of 1986 examined in conjunction with the misuse it

[1]Cf. Ellison, Ralph, The Invisible Man. It is indeed ironic that Asian Americans should find so much to build upon in the struggles of the African-Americans for their civil rights, so many shoulders to stand upon now that their plight in the political arena echoes that of the African-Americans of several generations ago.

enabled of the consent judgment procedures of that court, that rule, (since repealed in pertinent part) and the procedures associated with it would not withstand the scrutiny. The same can be said of the absolutely uncontrolled use of the canons of ethics as adopted by the District of Columbia Court of Appeals and in effect at that time to disqualify one's opponent's counsel on a purely tactical and harassing basis. The same can be said for "bonding" procedures scarcely worthy of the name, where the "protection" for the prejudgment seizure and destruction of one's business property was for all practical purposes non-existent -- what with the allowance of "payment" of the bond by uncertified, unverified check (in this case drawn on the business that was seized illegally itself) with no precaution against insufficiency of funds backing the check and with nothing to stop the party guilty

of illegally seizing the party from obtaining return of any bond posted before the merits of the pre-judgment seizure can be decided. All of these things make a mockery of due process and throughout these proceedings that was evident. Yet so many American judges went out of their way not to see -- to make of an Asian-American man whose small business was seized and destroyed as a result an invisible man. Justice should be blind, it is true, but only in balancing rights, blind as to favoritism for either side. Justice should not be so blind as to not see an entire race of overachieving American citizens. And yet that is the inescapable conclusion one must draw in studying this case. For even one of the most able of the Superior Court judges who handled a hearing in the case of Hoai in the Superior Court of the District of

Columbia,[2] the Honorable George Goodrich was quick to compare this situation to that of the "tong wars", though he, at least, did so totally without malice or bias. But the questions here are not those of internecine ethnic struggle; the

[2]At the time of these events the Superior Court of the District of Columbia had an incredibly inefficient system under which absent a "Calendar I Assignment" in a case as complex as this Hoai litigation, which has several branches in several courts, every motion was considered by a new and different one of over 50 judges, and if heard, was heard by a judge who had no previous familiarity with the facts of the case. This system, by a change in the rules of that court of which this Court, like any other, may take notice, has now, to the credit of the Superior Court's chief judge and administrators, been mercifully changed, effective January 1, 1990. Even though the Hoai litigation in that court was ultimately moved onto the then Civil I calendar by Hoai's counsel and placed before one judge, the first judge to be assigned it after that status was achieved, viciously attacked Mr. Hoai's attorneys for daring to take advantage of that provision designed for just such complex litigation as this and suggested that they ought to be sanctioned, a suggestion and quotation seized upon by his opponents in this and all the other branches of his litigation and inserted in the record at every available opportunity.

questions before this court concern why, when an Asian-American does turn to the courts of this country to right wrongs which have damaged him and injured him, destroying his business and career, he should be treated in a way so different from what has been the custom dictated in the lower courts by the decisions of this Court for the past forty years. The applicable precedent of this Court developed over forty years of interpretation of the civil rights laws as protective of fundamental federal rights. The resulting decisions and the general practices of the lower courts following those decisions have made customary in our courts certain basic principles of due process and the hearing of cases on their merits. It is particularly shocking that what has happened in this case has happened in the nation's capital, not in the outlying reaches of the country. Yet the techni-

ques employed below are precisely those of justice delayed, deferred, and of merits buried with procedural technicalities, technicalities that are applied with a prior purpose in mind that is not compatible with a blind and equal application of the laws. That purpose is manifestly to avoid the merits of the cause. Thus, what is evident on this record is the tactics not only by the opponents but by members of the judiciary also that were storied in the South for many years. The members of the Asian-American community admire the laws of this great land. We have, they say, many wonderful laws in this country. But they wonder why we do not apply them. Over the past forty years this Court has done much to inspire all who come here and all who wish to come here in the future by the shining example of our elevation of individual rights and liberties above transient politics of the

moment, above the petty corruptions of humankind. Yet here we see a manifest failure to apply those laws as set out by this Court and, disturbingly, an assumption that a Vietnamese-American, an Asian-American, will be able to do nothing to see that they are enforced. The rules of this Court specifically state that in instances where a United States Court of Appeals has either departed far from the accepted and usual course of proceedings, or has sanctioned such a departure by a United States District Court and done so so far as to call for the supervision of this Court, then the writ will be granted. Rule 10.1 (a). That is the case here. Further, the decision below in this instance not only departs so far from the accepted and usual course as to call for this Court's supervision, it also condones in the court below and itself conflicts with numerous applicable decisions of this

Court and for that reason, as noted, requires the issuance of the writ in this instance.

It is now too late too turn back the clock on civil rights. The promise embodied in the Declaration of Independence of inalienable rights, the framework designed to allow their development in the Constitution and the specific guarantees of that Great Instrument, all have been fulfilled in the great Civil Rights struggle of the last forty years. The American South has largely been freed from the burden of bigotry that lay heavy upon it. But now is the time of great danger. For yesterday's reformers, yesterday's oppressed, are now ensconced here in Washington, D.C. as the Nation's establishment. Let not their success be an ending and let not others who come after them in the great tides of immigration and assimilation be disappointed in their,

equally worthy, quest. Let them see the fulfillment and extension of that which was admirable in the great Civil Rights struggle. For those formerly denied participation in the dream must move on with its changes and the dream itself must always include, not exclude. This case is about that dream, which must not be made captive of any establishment, but must ever remain available for all Americans.

PURPOSE OF THE BRIEF AMICUS CURIAE

The Vietnamese Community recognizes that the petitioners have ably argued their own personal interests in having the Court issue the writ of certiorari as fully as they could have done under the circumstances. Yet the very tactics of the judges below in diverting attention from the governing issues and avoiding focusing upon them naturally prevented the petitioners from engaging the absolute core issues here in the depth that the

Court would normally require. This is particularly true with regard to the castigation of the appellants in the opinion below for reliance upon Lugar v Edmondson Oil Co. (1982) 457 US 922, which the appellate court pejoratively and somewhat contemptously characterized as a "sole reliance". (A-17) Does not the analysis in that case embody all of the important law in this vital area that went before ? We think so, and we think that the purpose of the appellate panel to thus trivialize by contempt for a justifiable reliance, coupled with its tactics of diversion from the issues presented by that case was exposed by its cursory dismissal in a footnote of the continuation of this Court's analysis in this important area of state action analysis in the judicial arena in the providentially intervening decision in Edmonson v Leesville Concrete Co. (1991) 500 US ____, 114 Led2d

660. What is wrong with relying on a case that is well written and dispositive of the issue at the time ? We would hope that this Court would give the signal that in the future such transparent tactics, reminiscent of the early days of the civil rights struggle, will not be tolerated in the Nation's Capital, of all venues. Asian-Americans are not fooled by the tactic of creating such an atmosphere of hostility and attack, as if a litigant did not count, that the litigant is hard-pressed to present the issues of the case for having to contest both the court below and his opponents in the case. Admittedly, the attorneys assisting the litigant here were not members of the civil rights establishment. And the record reveals that when they were compelled to file the complaint in question here they were busy in the companion case before the same judge. In that PMPA case, pursuant to or-

der, Sunoco had just filed a summary judgment motion and also an unordered motion for leave to file an amended answer, both of which had answers then almost immediately due. All of the established civil rights organizations refused to give assistance. Yet, as the accompanying brief shows the resulting complaint dces not have the defects ascribed to it by the appellate panel under an Edmonson-Lugar analysis, despite the modesty of Mr. Hoai's counsel concerning its quality, at least with regard to the 42 U.S.C. 1983 allegations.

Through its annexed brief amicus curiae the Vietnamese Community hopes to provide this Court with convincing evidence that the appeals panel was not only seriously in conflict with the applicable decisions of this Court in its manner of treating the complaint under Conley v Gibson (1957) 355 US 41 as petitioners have ably pointed

out, and not only departed from the accepted and usual course of proceedings in the federal courts in dealing with this complaint by an Asian-American civil rights litigant so far as to call for this Court's supervision, but also that this is true substantively under these recent cases in the developing area of 42 U.S.C. 1983 urisprudence, particularly as it concerns the area of state action by or jointly with or under the authority of the state judicial branches, and that, further, there is substantively an undecided question here sufficiently important to call for this Court issuing the writ of certiorari, one that shows that far from relying upon Lugar alone the appellants were relying upon a major and developing line of cases which this Court is even now carrying forward to a logical conclusion which will necessarily involve some of the questions presented here.

WHEREFORE, the Vietnamese Community prays that this Court grant its motion, and permit the filing of the annexed brief amicus curiae.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States mail, first class, postage prepaid, true and accurate copies, 3 each, of the foregoing motion this 20th day of March, 1992, to each of the following counsel of record below:

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INTEREST OF THE AMICUS CURIAE

The interest of the Vietnamese Community as amicus curiae appears in its motion for leave to file this brief, ante.

ARGUMENT

This case is manifestly about whether, in a continuation of the analysis which this Court recently carried forward in its opinions in Edmonson v Leesville Concrete, infra and Connecticut v Doehr, infra an appeals court may freely ignore and conflict with a host of decisions of this Court and, in doing so, may so far depart from the accepted and usual course of judicial proceedings in the reading of complaints in the face of dispositive motions and the treatment of civil rights generally where an emerging minority group is concerned as to escape the supervision of this Court when such supervision is in order. It raises an undecided question which this Court should decide concerning

the use of secondary procedures of a court to bypass the preliminary injunction and pre-judgment attachment procedures in order to bypass and thereby obviate the constitutional safeguards which this Court has placed upon such primary procedures.

Petitioners have pointed out that here the courts below did not face the question of whether the rules and customs of the Superior Court and the law of the District as applied in that court which were used to take Mr. Hoai's gas station franchise from him in order that it might be bestowed upon Mr. Vo did present a violation of 42 U.S.C. 1983. Instead the courts below went out of their way to rationalize not allowing the consideration of these laws, rules and customs as they are.

An examination of the substance of this D.C. law, rule and custom reveals that had it been examined petitioners had a case. A proper understanding of this underlying

case is important because the question of whether it should have been examined, while important, nonetheless cannot help but be colored by the strength of the merits of that case. By examining the brutal nature of the deprivation of property without due process in this instance, we can see, just as the smooth procedural talk of a former era covered over the deprivation of life and liberty without due process in cases such as Screws v United States (1945) 325 US 91, 65 SCt 1031, just how much evasion was going on below here. For the rationales advanced by the court of appeals in this instance have precisely the same sort of reasoning as those struck down by this Court in Screws. What made this error so obvious and egregious here was the intervening decision of this Court in Edmonson v. Leesville Concrete Co. (1991) 500 US ___, 114 Led2d 660, (decided June 3, 1991, between

oral argument and the decision below) whose actual implications for this case the appeals court declined to consider, despite being petitioned to do so. Also decided in that intervening time was Connecticut v Doehr (1991) 501 US ___, 115 Led2d 1, which the court below did not address but which we discuss here, since it showed that the type of underlying claim used here would not justify the type of unconstitutional property seizure enabled by the D.C. court procedures and law. Moreover, as we shall show, there were allegations of the complaint denoting the actual case which the petitioners did not have room in their brief to cover and which the Court should consider.

Petitioners, bound by space limitations, were not able to focus upon the need to apply the state action analysis of Edmonson. Yet they had petitioned the court of appeals for a rehearing based on that

intervening decision so that the framework articulated in that case might be applied here. A-579 ff., A-582 ff. As this case exhibits a situation much like that of Terry v Adams, infra as it followed Smith v Allwright, infra (as we discuss below,) this case should be heard to impress upon lower courts that ducking the issues in this way, in conflict with applicable decisions of this Court, and the condoning of the use of secondary procedures and laws to avoid constitutional safeguards built into primary procedures as was done here here will not be permitted. This evasion of constitutional responsibilities must be eliminated, precisely as such subterfuge was struck down in Terry.

The Edmonson decision crystalizes a long line of thoughtful cases contemplating these problems and the refusal to treat it seriously and in depth in a case in which it so providently applies at the crucial

juncture is a clear example of a court of appeals both making a decision upon a federal question that conflicts with applicable decisions of this Court (here a line of cases that was clarified even while the opinion below was being written) and failing to follow the usual course of judicial proceedings so as to call for the supervision of this Court. For, in failing to apply the Edmonson state action analysis, the appeals court also ignored standard rules for interpreting the pleadings in favor of the plaintiffs upon a motion to dismiss and the standard of Conley v Gibson (1957) 355 US 41, in particular. In order to stretch its decision so that its conflict with the applicable decisions of this Court might not be so apparent, the appellate court distorted the factual pattern in this case in a manner departing from customary procedures in order to fit its procrustean analysis. It created a

need for the exercise of the supervisory powers of this Court, particularly where Asian-American civil rights litigants are concerned. For they too pursue the dream and are entitled to build on the precedent that has gone before in seeking their remedies, not be blocked with deviations from that precedent.

Edmonson further defined the framework for state action analysis set forth in Lugar in a manner that directly applies, but which the appellate court refused to adopt. In a footnote the intervening analysis was cursorily dismissed with the following comment:

> At the same time, Edmonson reaffirms the basic principle that private use of state legal procedures does not rise to the level of state action absent "the overt, significant assistance of state officials." See id., slip op. at 7 (citation omitted). Because the peremptory challenge system "simply could not exist" without the direct and indispensable participation of the state and, more particularly, of the judge, the Court found the requisite "significant assistance" in Edmonson. Id. at 7-9. In the instant

> case, by contrast, such meaningful assistance is never alleged, and Edmonson is, therefore, inapplicable.

The footnote attempts, in the first sentence above, to judge the merits while purporting not to do so. It implies that all that occurred here was routine private use of the court system and that there was no overt, significant assistance of state officials. The first implication, as we will show, is not accurate, and the second is both inaccurate and not completely applicable. But immediately the footnote itself fails to support these implications because it then speaks, not of what could have been shown had the petitioners been allowed to support the general allegations of the complaint which the appeals court was avoiding, but rather of what the petitioners ostensibly failed to allege. The conclusion is that Edmonson is inapplicable, not because it does not apply on the merits of the case as might be

proven on behalf of Mr. Hoai and his colleagues, but rather because something called "meaningful assistance" is "never alleged". The footnote shows indifference to whether a case can be proven in support of the allegations of the complaint or not. As petitioners point out in their brief, having ignored those allegations of the complaint which do assert that the wrongs complained of were committed under color and authority of the laws and which could be supported by the actual facts, the appeals court then used its selective reading of the complaint to imply a lack of merit to the case which it then attempts to justify by pointing to its selective reading of the complaint as if it had actually read the complaint as required by the long standing practices of the federal courts. This is clearly not to read the complaint in favor of the plaintiffs but rather to depart from ac-

cepted precedent in order not to do so. The appeals court both rendered a decision substantively in conflict with applicable precedent of this Court, (particularly that just then being decided,) and, in the manner in which it read the complaint, varied sufficiently far from the accepted and usual course of judicial proceedings as to call for the supervision of this Court. There is also such a departure with regard to the way complaints are read and decided upon in the face of a dismissal motion using extensive material outside the record which the judge then relies upon. This is with regard to a minority group -- Asian-Americans -- which is just emerging as a participant in the struggle to preserve its people's civil rights in the courts and whose members are entitled to more than the "invisible man" treatment accorded here.

A meaningful analysis, in accord with the numerous decisions of this Court upon a procedure which allows attachment or seizure of property prior to judgment or its equivalent must begin with the framework of rules, law and Superior Court customs which are claimed to have provided the color and authority of District law used to deprive the complainants of their federal rights by such a seizure or attachment. In this case the petitioners, as plaintiffs below, alleged that they were deprived of their federal rights and privileges by a certain procedure of the Superior Court, namely, that of the entry of a "consent order." A-392-95, complaint

below, paras. 38-44.[1] It is pointed out in paras. 16-17 (A-378-79) that respondents Zulli and Wagner "participated actively in the decision to use the color and authority of state law to deprive plaintiffs of rights, privileges, immunities and property under color of D.C. law..." In para. 18 it is alleged further that respondent Forester did likewise. A-379-80. Para. 34 of the complaint alleged that Hoai was deprived of John D. Hemenway as his counsel of choice at the crucial

[1]As the petitioners have pointed out in their brief, they did allege that what was done was done under the color and authority of the rules, regulations, law and customs of the Superior Court. Some of the allegations were detailed, as these concerning the use of the consent order procedures, others were general and petitioners did not specifically name the enabling Rule, 12-I(b), of the Superior Court as it then stood. We will not reiterate here what petitioners pointed out about the selective nature of the "seeing" engaged in by both courts below but will rather give an accurate analysis of the framework of laws, customs and rules actually involved, all of which, we hasten to add, are matters of which any federal court may take notice.

juncture "under color and authority of the laws, regulations or rules, and customs of the District of Columbia." The use of consent orders, as in any court, in the Superior Court is a law and custom. It is fully alleged in the above paragraphs how it was entered and, though a private agreement, became a full judgment as any other of that court, signed by a judge. This, of course, had to involve procedures and rules of that court as well as the full participation of one of its judges who, indeed, is alleged to have signed the private agreement between the respondents and thereby made it a judgment like any other judgment, surely a use of the color and authority of the Superior Court. Here the entry of the consent judgment was empowered by a particular rule, the Judge-in-Chambers rule, Rule 12-I(b) of the Rules of Civil Procedure of the Superior Court as it then stood. C-11

It is precisely alleged (para. 43, A-394-95) that by this "device" the respondents thereby obtained "the color and authority of the laws, regulations and customs of the District of Columbia in order to deprive plaintiffs of their property, rights, privileges and immunites as complained of herein." Here it is alleged (para. 43, A-397) that these things violated the due process clause and the petitioners' right to petition for redress under the Constitution and, further, (para. 44, A-397) that this was done by the "very color of law and apparent authority of the Superior Court to deprive the plaintiff Hoai of those important rights, privileges and immunities and of his property the gas station franchise." It would seem to be far too late in the day to hold that because the particular Rule was not actually cited by name and number the petitioners are out of court.

This would seem to be a throwback to a "single misstep is fatal" type of pleading, relying overmuch on technicalities to eliminate just complaints, that has long since ceased to be the practice in the federal courts.

Though some of this ground was covered by the petitioners in their brief, they had not room to point out the emphasis on the use of the consent order procedure of the Superior Court, something which was thoroughly alleged and just as thoroughly ignored (though clearly understood) by the courts below. The point of this case is not that the respondents made use of a pre-judgment attachment or seizure provision as such of the type at issue in Sniadach v Family Finance Corporation (1969) 395 US 337, or in Fuentes v Shevin (1972) 407 US 67 or in Lugar v Edmonston Oil Co. (1981) 457 US 922, all of which this Court found to violate due process

rights and therefore present a 42 U.S.C. 1983 cause of action, or even that they made use of an arguably violative attachment procedure such as was at issue in Mitchell v W.T. Grant Company (1974) 416 US 600, which was upheld. For it was the use of this procedure in tandem with Superior Court Rule 12 -I(b) as it then existed, (C-11) which created the unconstitutional procedure complained of. This procedure allowed respondents to bypass the requirements of Rule 65 of the Superior Court (which was Federal Rule of Civil Procedure 65 with slight modifications) with its safeguards against improper injunctive seizure of property prior to trial and the local rule on pre-

judgment attachments as well.[2]

Thus the question in this case, unlike that in those cited above, is not whether the procedures for prejudgment attachment or garnishment or replevin are constitutionally defective, but whether the procedures of the Superior Court which the respondents successfully used to avoid those procedures and the procedures attending Rule 65 were constitutionally defective and whether their use by the respondents provided a cause of action against them. In this the present case is remarkably similar to the subject of this Court's opinion in the Jaybird Party case, Terry v Adams (1953) 345 US 461. In that

[2]The rules of the District of Columbia Superior Court regarding attachment before judgment and replevin and the corresponding D.C. Statutes, are reproduced in the back of this volume. The Court can see that they are carefully structured to comply with the Court's holdings in Sniadach and Fuentes, supra and indeed the official comment refers the reader of these rules to that authority. So it is clear what the respondents were avoiding here.

case this Court dealt with the problem presented by the fact that it had struck down the practice of barring African-Americans from primaries then practiced by the European-Americans of Texas in a series of decisions; yet the Euro-Americans of one Texas county, through what they claimed was purely private activity, achieved the same result -- a segregated primary that rendered the African-American vote completely ineffective. Originally, in Nixon v Herndon (1924) 273 US 536, this Court struck down as violating the 15th Amendment a Texas statute that a Negro could not vote in a Democratic Party primary election in the state. The Texas legislature then reenacted the statute in a slightly different form to give the State Executive Committee of the Democratic Party the power to prescribe the qualifications of its members for voting or other participa-

tion. The State Executive Committee of the Democratic Party then adopted a resolution that no one but white Democrats might participate in the party's primaries. This Court struck down this obvious subterfuge in Nixon v Condon 286 US 73, finding that, albeit delegated, this was still state action and hence still violative of the 15th Amendment. Next the Texas Supreme Court found that political parties were voluntary associations, private voluntary associations and the Democratic Party in a convention adopted a resolution that declared that its membership was open to whites. This too was struck down by this Court in Smith v Allwright (1944) 321 US 654 where it found that the Democratic Party, for purposes of the primary, was an agency of the state of Texas. Finally, in Terry this Court found that the reach of the 15th Amendment could not be evaded by the

Jaybirds of Fort Bend County, Texas, who created their own primary, held just before the legitimately authorized one of the State, and made sure that the winner of their "private" primary always won the official, statutorily authorized primary a few weeks later. This Court found that this subterfuge did not succeed in removing the Democratic Party and its members who made up the overlapping and controlling Jaybird Party from the reach of the 15th Amendment. Following intervening precedent from the 4th Circuit that a State cannot nullify the constitutional rights of Negroes to vote in primaries by casting their electoral process in a form which permits a private organization to practice racial discrimination in the primary election, the Court found that a State which, by circumvention, allows that which is the equivalent of a segregated primary still violates the 15th Amendment.

Mr. Justice Frankfurter, in particular, found that "the State authority has come into play." The State of Texas, he found, had entered into a comprehensive scheme of regulation of primaries and, as a result of the earlier cases, Texas officially by statute banned segregation from its official primaries. Because the same officials participated in the Jaybird primary as ran and participated in the official primary, the Jaybird operators could not divest themselves of State authority.

With some variations, which we will discuss below, that is what happened here. The District of Columbia has a comprehensive scheme for assuring that there are not pre-judgment attachments or seizures of property without all the safeguards of due process. Indeed the preliminary injunction rule, Rule 65 of the Superior Court, which is the same as the federal rule with only a few exceptions, and Rule

64, 64-I regarding attachments before judgment, and Rule 64-II governing replevin, are all placed together in the Superior Court rules with Rule 65 to make a comprehensive scheme governing all taking of what is arguably the property of another before judgment. Yet, just as Texas had a comprehensive scheme, as a result of this Court's earlier decisions, which statutorily purported to bar the exclusion of blacks from primaries and yet enabled the Jaybird Party to do just that through its officials in charge of the primaries, so there were rules, law, and customs of the Superior Court here that allowed parties to bypass the safeguards of Rule 65 and Rules 64-I and II and the statutes and law behind those rules.

Just as the Jaybird Party claimed to be a private association carrying out private acts, so the respondents here claim they were private individuals carrying out pri-

vate acts, making routine use of the processes of the Superior Court. And, indeed, a large part of the appellate opinion rests upon this premise.[3] However, (and this is what the appellate court so resolutely ignored) what was involved here was the use by the respondents of procedures provided by the court rules and laws of the District of Columbia to evade and get around the strictures attendant upon a normal progression under Rule 65, with all of the safeguards built in to that rule. And this is the course which the respondents were embarked upon when they decided to use the "back door" provided by Rule 12-I(b) as it then stood

[3]Thus belying the appellate opinion's claim that it rests only upon the allegations of the complaint. It is apparent that the appellate opinion only uses this claim -- that it rests solely upon the allegations of the complaint, without going to the merits -- to harm the respondents' cause and that, by contrast, the underlying merits are referred to in order to justify the decision to bury respondents' case so that its merits will not be heard.

and the consent order procedures of the Superior Court. In his sworn affidavit which was before the district court judge, attorney Wagner of Sunoco admitted that the purpose of the procedures used was to avoid the preliminary injunction hearing required by Rule 65, saying:

> Mr. Roseman inquired whether Sun would be willing to consent to an extension of that provision of the temporary restraining order which required Sun to continue to supply petroleum products until further order of the court in lieu of proceeding with a preliminary injunction hearing. A-472-73,

This affidavit was before Judge Oberdorfer in the related Petroleum Marketing Practices Act ("PMPA") case of Hoai against Sun, in which he granted summary judgment on liability to Hoai after Hoai's motion had been pending over a year and a half. On the same day he issued the order dismissing this case and demanded a show cause as to why Hoai's attorneys should not be sanctioned, ignoring the outstand-

ing motions to stay matters in this case until the impact of the pending PMPA decision could be absorbed into it, motions he has never decided. Hoai v Sun Refining & Marketing Co., Inc. U.S.D.C. D.C. CA 87-2456. The PMPA outcome was compelled by the intermediate reversal of Judge Oberdorfer's sua sponte abstention in that case as reported in Hoai v Sun Refining & Marketing Co., Inc. (CA DC 1989) 866 F2d 1515. Subsequently, in the PMPA case on remand, Mr. Roseman himself was deposed and his version of this evasion is now a matter of record in that case, viz:

> During the course of my conversations with Mr. Wagner, we discussed the possibility of settling the dispute immediately before, immediately before the court involving the temporary restraining order and avoiding the necessity to go to a preliminary injunction hearing following the entry of the temporary restraining order. Deposition testimony of David C. Roseman in CA 87-2456, June 25, 1991, p. 12 as filed in that case.

A few pages later, p. 15, this purpose to evade the constitutional strictures of Rule 65 was confirmed, viz:

> Q You mentioned that there came a time in your conversation with Mr. Wagner when you discussed the possibility of avoiding a follow-on preliminary injunction hearing. Did I understand that correctly ?
>
> A That's correct.
>
> Q When did that occur, in this same conversation or a later conversation ?
>
> A That would have been in the first conversation. Well, let me take that back. I can't say for certain that it was the first conversation. It may have been in another conversation shortly after that initial telephone call but it was quite early on following the TRO hearing.

So that it can readily be seen that within a few days after the TRO hearing on August 29, 1986 the parties respondent were beginning to work together to bypass the procedures of Rule 65 with its built in Constitutional safeguards. This is quite similar to the way that the Jaybirds of Fort Bend County, Texas, set themselves up

to bypass the constitutional requirements which they correctly foresaw would require them to admit negroes to vote in the primary if they used the official statutes set up to govern the primaries overtly. This bypass itself, however, involved two laws and regulations of the court, the consent judgment procedure and the judge-in-chambers procedure of then Rule 12-I(b), and particularly the latter's sanction and mandate for ex parte decisions on whatever the sitting judge-in-chambers found appropriate, completely without governing standards or control. C-11.

Thus, the attorneys Roseman and Wagner were setting up almost immediately after the TRO hearing to work together to bypass the constitutionally required follow-on preliminary injunction hearing under Rule 65 and eliminate any notice to or participation by the petitioners on what would happen to Mr. Hoai's franchise. When,

shortly thereafter, they agreed between themselves to terminate Mr. Hoai's franchise and give it to Mr. Vo., they, therefore, did so specifically to avoid the requirements of Rule 65.[4] Thus, this is manifestly not a case, such as those cited by the appellate panel (A-16, 17) where the respondents were taking "mere recourse

[4] It is now a matter of res judicata that Sun terminated Hoai's franchise by the activities of September 8, 1986 culminating in the entry of the consent order (A-465) which, by its terms, was cast as an extension of the TRO (A-461). This was taken notice of in this case in the appeals court, Hoai v Vo (CA DC 1991) 935 F2d 308, 311, n.1, in noting that summary judgment as to illegal termination by Sun had been granted. Thus, it is also now res judicata, since Hoai was the franchisee until terminated by Sun, that Vo never had any legitimate claim to be in control of the franchise and was a mere scrambler in the station. Since the TRO, by its terms, is based on the tort of wrongful eviction, a tort only available to a tenant against a landlord, the findings of the TRO judge, which were purely procedural in that they would have required Sun, then Hoai's co-defendant, to evict Vo through the summary procedures of the Landlord and Tenant branch of the Superior Court, were clearly erroneous and the TRO was groundless in the first instance.

to state or local procedures" as posited by the appellate panel in passing on the merits of the claim while purporting not to do so. Rather this is plainly a case where the wrongdoers, resorting "merely" to the court procedures used still other court procedures to bypass the procedures which the respondent Vo and his counsels Roseman and Ottman had originally "merely" resorted to, once they saw that they might not succeed with the procedures originally chosen. The complaint here is that, having resorted to Rule 65, respondents then used other procedures of the Superior Court, local to it, to bypass the constitutional safeguards built into the procedures of Rule 65 and allied rules.

It is the law of the District that every attorney, as an officer of the court, is charged with a knowledge of its rules. Lynch v Meridian Hill Studio Apartments (DCCA 1985) 491 A2d 515, 518-20. Though

that would almost seeem to go without saying. It is similarly the law of federal practice, known to all who practice under the federal rules, that Rule 65 provides for a TRO on a temporary, emergency basis in unusual circumstances only because a TRO is indeed temporary and cannot last unless the party obtaining it can, at a follow-on preliminary injunction hearing prove his or her entitlement to a preliminary injunction. Indeed, the TRO judge below promised Mr. Hoai on the record during the TRO proceedings that he would have a follow-on preliminary injunction hearing at which the merits of his

contentions would be heard.[5] Certainly, this Court has long since made it known that the rights of due process, requiring notice and an opportunity to be heard, are inherent in the scheme of Rule 65 and must be adhered to, thus putting all on notice that a failure to comply with these requirements in any proceeding for injunctive relief under Rule 65 violates basic constitutional rights of the affected parties who do not receive notice and are not afforded an opportunity to participate. Granny Goose Foods, Inc. v Brotherhood of Teamsters & Auto Truck Drivers Lo-

[5]THE COURT: ... and this is just the first hearing and no matter what occurs here, whether it is granted or denied, you will have another day in court. 10 days from now or depending on what the outcome is, certainly within the next two weeks, this will not be the only hearing, you will have this hearing and -- before the emergency, then you will have another hearing and that will certainly give you the time that you need. Hon. Annice Wagner addressing petitioner Hoai, transcript of the TRO hearing, Vo v. Sun, District of Columbia Superior Court CA No. 7075-86, pp. 28-29.

cal No. 70 of Alameda County (1974) 415 US 423. There can be no doubt that respondents were using one set of laws and rules of the Superior Court to bypass the constitutional safeguards built into Rule 65.[6] By contrast to Rule 65 there is no equivalent in the Federal Rules of Civil Procedure to Superior Court Rule 12-I(b).

Thus the judgment of the appellate panel here that the respondents were engaged in "mere recourse to state or local court procedures" which attempts to dispose of petitioners' case fully on its merits without purporting to do so (A-16-17) is not supported by what actually occurred

[6]It should be noted here that D.C. Code §11-946 (1981) provides: "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure ... unless it prescribes or adopts rules which modify those Rules." The official note to Superior Court Rule 65 states: "COMMENT: Identical to Federal Rule of Civil Procedure 65 except for ..." and then there follows some modifications not pertinent here. In the opinions of the D.C. Court of Appeals federal case law on the federal rules is relied upon and cited in interpreting D.C. Rules.

here, a truth which both courts below seemed quite anxious to avoid. And, as one would expect, the authority cited in support of this mischaracterization does not embody fact situations similar to the present one. This authority consists of this Court's opinion in Dennis v Sparks (1980) 449 US 24, 28; Crabtree v Muchmore (CA10 1990) 904 F2d 1475, 1476; Jones v Poindexter (CA 4 1990) 903 F2d 1006, 1010-11; and Tunstall v Office of Judicial Support (CA3 1987) 820 F2d 631, 634. An examination of these cases, however, reveals that none of them involve a situation where parties and counsel, having initiated a court procedure with constitutional safeguards, then elected to bypass the constitutional safeguards of that procedure through the device of other procedures of the same court that eliminated those constitutional safeguards and in so doing did violate the rights, including

due process, of other parties.

The opinion in Dennis v Sparks involves the questions presented when individuals conspire together to bribe, and do bribe, a judge. It is true that in that case this Court did indeed state that "merely resorting to the courts and being on the winning side of a law suit does not make a party a co-conspirator or a joint actor with the judge." 449 US at 27-8. But then it went on to state:

> But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators.

The plaintiffs here, recognizing the judge's common law immunity even were he culpable (and it appears he was merely negligent) sued only the parties who used

the procedures, just as in Lugar. But here the procedures themselves are under attack, which was not the case in Dennis.

What Dennis v Sparks did establish was liability under 42 U.S.C. 1983 for the misuse of court procedures or authority when there is joint participation. It did not deal with the question of the misuse of defective court procedures that are themselves creatures of the law of the state. In Crabtree, the court did not favor us with sufficient facts to find out what the basis of the complaint really was. It appears to have been one of joint action between the private party defendants and the judge and not in any way to have involved either a): avoiding a procedure of the court so as to nullify constitutional safeguards or b): to have involved a substituted set of procedures used to get around procedures that would have protected against the alleged viola-

tions. Similarly, the citation of the Jones v Poindexter case turns out to be more of the selective reading of the complaint addressed by petitioners in their brief. In Jones that branch of a Lugar analysis which addresses the illegal use of otherwise sustainable state procedures is addressed, not the other branch of the Lugar analysis that produced a victory for Mr. Lugar in that case, namely his attack on state procedures that was sustained. Certainly in Jones there was absolutely no question of using one set of the court's procedures to evade the constitutional safeguards of another set of procedures that had been chosen by the party complained about. In the Tunstall case it was specifically held that the case did not involve any seizure of property with the aid of state procedures or any claim of a preexisting debt such as Vo was making here in his Superior Court suit.

We turn then from this inapplicable authority and the rule which was bypassed with its attendant Constitutional safeguards to the laws and procedures of the Superior Court which were used to do the bypassing and thus place Mr. Hoai, with regard to his due process rights, in the same position in which Mr. Terry was placed with regard to his right to have a meaningful vote in the primary elections of the Democratic Party of Texas.

The petitioners have pointed out in their brief the extraordinary diversion from the issues that went on in the panel hearing in this case. They also have pointed out the selective reading of the complaint in both courts below in which the allegations of the violations of local rules, law and practices (i.e., Rule 65) were emphasized as if they were the only allegations and the allegations that the very violations themselves, both of state

and federal law, were done under other color and authority of the laws and customs of the Superior Court, were ignored. We have pointed out how the allegations concerning the use of the consent judgment procedures of the Superior Court were ignored by the appellate panel.

In the District consent decrees are both a contract and a judgment when rendered in a competent court by consent of the parties. Bloedorn v Bloedorn (1935) 64 AppDC 199, 76 F2d 812, cert den 295 US 746, 79 Led 1691, 55 SCt 658. Although here it was recognized prior to the dismissal of this civil rights suit, in the related PMPA suit by the court of appeals, that the consent decree here represented no "independent judgment" of the Superior Court, those words were very carefully chosen by the appellate judge to indicate that it was not an independent judgment, not that it was not a judgment. Hoai v

Sun Refining & Marketing Co., Inc. (CA DC 1989) 866 F2d 1515, 1519. Nonetheless, though a consent order is not an exercise of independent judgment it is still, once it is signed by a judge, a judgment, and, as such, is just as binding on the parties entering into it and their privies, as here Hoai was a privy with Sunoco. This is as true in the District as elsewhere. Universal C.I.T. Credit Corp. v Gogos (MCA 1962) 184 A2d 197, 198. This Court has long recognized "that judicial action is to be regarded as action of the State for purposes of the Fourteenth Amendment." Shelley v Kraemer (1948) 334 US 1, 15 and numerous cases cited therein on this point. In the District, of course, it is the 5th Amendment rather than the 14th that furnishes the due process requirement. But the state action analysis would be the same. Lugar, of course, makes clear that the state action analysis of

the 14th Amendment for the purposes here is the same as it is for the "color and authority of state law" analysis under 42 U.S.C. 1983. Hence, a judicial procedure which enables attachment before judgment in the manner analyzed in Edmonson, Doehr and the cases leading up to them raises questions of misuse of color and authority of state law under 42 U.S.C. 1983.

Here the procedure was a combination of consent judgment with Rule 12-I(b), which, as petitioners have shown, contained language allowing the judge-in-chambers to do ex parte whatever he felt was "appropriate for such disposition", and to issue TRO's without any check on that procedure, which, in this case was taken to include "extending" one contradictorily to the promises of the judge that had issued it and without any concern for Mr. Hoai as the party most affected. It was a rule without controlling standards and no

qualifications to ensure due process or any other federal privilege, immunity or right. In Mitchell, supra this Court recognized the necessity for procedures enabling private, ex parte attachment or seizure, in that case the Louisiana writ of sequestration, to be "narrowly confined" (Id. at 617) if they are to pass constitutional muster. Former Rule 12-I(b) of the Superior Court of the District of Columbia was so broad and loose that it was modified effective January 1, 1991 to eliminate completely the authority to issue Temporary Restraining Orders and the broad, loose, completely uncontrolled delegation of authority in the language: "orders involving executions upon attachments, and any other matters appropriate for such disposition." In place of this broad, uncontrolled authority, the judge-in-chambers is now authorized to carry out the following, narrow functions:

> Approval of accounts, warrants and return of warrants, approval of subpoenas for administrative proceedings, applications for appointment of special process servers in small claims cases, applications for name change, petitions to release mechanic's liens, applications for entry of administrative agencies' final orders as judgments, petitions to take depositions pursuant to Rule 27 (a), master-meter proceedings under D.C. Code §43-541 et seq. (1981); and requests for issuance of subpoenas under Rule 28-I(b).

It's a long way from TRO's and "other matters appropriate" to "master-meter readings", the distance between lack of constitutionality and that which complies with this Court's mandates of due process.

Regardless of what its intent may have been, Rule 12-I(b) as it was in September, 1986 created a procedure which, when coupled with the consent judgment procedure of the Superior Court, created a completely unchecked avenue for evading the Constitutional restraints controlling preliminary injunction proceedings and the pre-judgment attachment procedures of the

court. But it took a willingness to deliberately choose these procedures to eliminate the safeguards of due process in order to embrace the procedure for such purposes to achieve what occurred here. This is precisely then, in relation to this Court's line of cases embracing formal pre-judgment attachment, seizure and sequestration statutes and procedures, what the Jaybird Party operation of the pre-primary primary was to the laws of Texas regulating primaries -- a bypass.

Was this bypass clothed with the color and authority of the state for 5th Amendment and 42 U.S.C. 1983 purposes ? That is the undecided question of vital import which this Court should take up and decide. It is to that question which the state action analysis of Edmonson, building upon Lugar (as made clear by Doehr in this instance) should be applied. If the respondents had simply bribed the TRO

judge to extend the TRO the way that they did here, their action would be actionable under Dennis v Sparks. If they had used a formal attachment procedure as loose as the procedures they did employ here they would have been liable under Sniadach, Lugar and the other decisions in that line. Judgments are the exclusive preserve of the courts, without which they would have no purpose and meaning. The consent judgment procedure is the only procedure by which private parties may take over the essence of the judge's function and then gain his official imprimatur as the imprimatur of the court upon their private actions. This is delegation to private parties of a power "traditionally exclusively preserved to the State." Here unconstitutional deprivation was permitted to occur "within the courthouse itself". It was an action here that could not have existed, and the procedures enabling it

could not have existed, "without the overt, significant participation of the government." There was authorization by rule of the court enacted pursuant to statute and by established law of the District. An Edmonson analysis is in order: (1) because of the conflict with decisions of this court inherent in what happened here; (2) because to rationalize it the usual course of judicial proceedings were far departed from; and (3) because it presents an undecided question in the same manner that Terry v Adams did, one that is important and should be decided. Finally, it is important that this Court show that Asian-Americans have civil rights also and it will not permit any minority to be treated like Ralph Ellison's "Invisible Man" in the Article I courts of the Nation's Capital.

Respectfully submitted.

THE VIETNAMESE COMMUNITY OF
WASHINGTON, D.C., MARYLAND

AND VIRGINIA

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States mail, first class, postage prepaid, true and accurate copies, 3 each, of the foregoing petition this 19th day of March, 1992, to each of the following counsel of record below:

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Supplemental Appendix of Rules and Statute referred to in Amicus Curiae brief

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SUPERIOR COURT OF D.C. - CIVIL RULES

RULE 64-I

ATTACHMENT BEFORE JUDGMENT

(a) APPLICATION AND NOTICE TO DEFENDANT. An application for a writ of attachment before judgment, shall set forth, by affidavit, specific facts meeting the requirements of D.C. Code §§ 16-501(c) and (d) (1981). The application shall be accompanied by a prepared Notice to Defendant on CA Form 105 supplied by the Clerk. The Clerk shall send such notice to the defendant by first class mail at the address shown on the notice, or in case of a foreign corporation to its registered agent, if any, and shall note on the docket the date of such mailing, if defendant's address is listed on the notice as unknown, the plaintiff shall file with the notice an affidavit setting forth the plaintiff's reasonable efforts

to ascertain defendant's current mailing address.

(b) ISSUANCE. An application for a writ of attachment before judgment shall be submitted to the Civil Calendar Control Judge who may approve or deny issuance or may direct such further hearings before issuance as deemed appropriate.

(c) ANSWER OF GARNISHEE. A garnishee shall file with the Clerk the answer to the interrogatories accompanying the writ of attachment within 10 days after service of the writ upon the garnishee, and shall serve a copy of the answer upon the defendant and upon the party at whose instance the garnishment was issued. If within 10 days after service of the answer to the interrogatories or such later time as the Court may allow, the party at whose instance the garnishment was issued shall not contest the answer to the interrogatories pursuant to D.C. Code §16-522

(1981), the garnishee's obligations under the attachment shall be limited by the garnishee's answer.

(d) HEARING. If a hearing is held as a result of a filing of a traversing affidavit by the defendant or the garnishee pursuant to D.C. Code § 16-506 (1981), the plaintiff shall be required to establish the validity or probable validity of the underlying claim and the existence of the ground for issuing the attachment.

(e) PRIORITY OF LIENS. For purposes of determining priority of successive liens, a writ of attachment issued under section (b) of this rule shall be effective from the date of its delivery to the marshal.

(f) EXPEDITION OF MOTIONS TO QUASH. All motions to quash attachments shall be heard by the Court on an expedited basis. Upon at least three (3) days notice to all parties, the Court may in appropriate cases order that the action in which the

motion was filed be tried on the merits at the same time the motion is heard. (Revised 1/1/82)

(g) DISCOVERY. For good cause shown, the court may in its discretion permit discovery in attachment before judgment proceedings in the manner provided in Rule 69-I.

COMMENT: ... In connection with Rule 64-I, see Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972).

RULE 64-II

REPLEVIN ACTIONS

(a) Upon filing any action in replevin and before process therefor is placed in the hands of the U.S. Marshal or other process server, the plaintiff, personally or by the plaintiff's attorney, will bring the action to the attention of the Civil Calendar Control Judge.

(b) At that time the plaintiff may request that the Calendar Control Judge set a date for a hearing at which plaintiff

will be required to establish the probable validity of the plaintiff's claim and defendant will be given an opportunity to appear and be heard with respect to whether a writ of replevin should issue. If, upon such application, the Calendar Control Judge determines that the plaintiff has filed a verified complaint alleging that defendant is wrongfully detaining certain specified property which plaintiff is entitled to possess, the Calendar Control Judge may issue an order directing the defendant to preserve the property which is the subject of the action in the defendant's possession or under the defendant's control so as to keep it amenable to the process of the Court pending further order of the Court. The order will also indicate the date on which plaintiff's application for a writ of replevin will brought on for hearing and will inform the defendant that the

defendant may be heard at that time, with or without witnesses, on whether the writ should issue.

(c) The order shall direct plaintiff to cause a copy of the summons, complaint, and order to be served upon the defendant at least 5 Court days prior to the date set for the hearing. If they are not served by that time, the plaintiff shall apply to the Calendar Control Judge to set a later hearing date which will provide the defendant with sufficient time to make adequate preparation therefor. In any order entered under this Rule, the Calendar Control Judge may include such requirements with respect to the method of service as to accomplish prompt and expeditious notice to the defendant.

(d) At the conclusion of the hearing, the Calendar Control Judge may authorize the issuance and execution of a writ of replevin or may, if it appears just,

permit all or part of the property to remain in the possession of the defendant pending further order of the Court. In the latter event, the Calendar Control Judge may require the defendant to post an appropriate surety bond or other undertaking or may otherwise provide for the protection of the property pursuant to D.C. Code §16-3708.

(e) The Civil Clerk's Office will not process any writ of replevin until its issuance has been approved by the Civil Calendar Control Judge. Plaintiff shall not be obliged to submit the requisite surety bond until such processing takes place.

(f) In making initial application to the Calender Control Judge, plaintiff may apply for issuance of the writ without prior adversary hearing on the ground that there is an immediate danger that the defendant will destroy or conceal the property in

dispute or on any other ground set forth in D.C. Code §16-501(d)(2), (3), (4), or (5)(1981) as a basis for attachment before judgment. Upon such application, supported by affidavit or sworn testimony reciting specific facts which tend to establish the grounds therefor, the Calender Control Judge may, if deemed appropriate, authorize the immediate issuance of the writ prior to the hearing. If the Calender Control Judge authorizes such issuance, the Calender Control Judge shall enter in the record findings of fact and conclusions of law which state the basis of the need for such immediate issuance. The defendant against whom a writ of has been issued in this manner may, on not less than 24 hours notice to the plaintiff, apply to the Court to have the writ vacated. If such writ issues, a hearing shall take place on the 5th Court day after execution of the writ. It shall

be the duty of plaintiff's counsel to notify the Civil Assignment Office promptly of the execution of the writ.

(g) Trial of all actions in replevin, whether on the jury or nonjury calendar, shall be expedited. (Added 3/30/73)

(h) By consent of all parties, the judge conducting a hearing on the issuance vel non of a writ of replevin may try the entire proceeding on the merits in lieu of merely determining whether or not the writ should issue. (Added 3/30/73)

COMMENT: See Fuentes v. Shevin, 407 U.S. 67 (1972). (Added 3/30/73)

Superior Court Rule 12-I(b) as it was amended effective January 1, 1991, eliminating the unconstitutional provisions.

RULE 12-I

MOTIONS PRACTICE

* * * *

(b) JUDGE IN CHAMBERS

(i) The following matters may at any time be presented for disposition to a Judge in Chambers designated by the Chief Judge, either ex parte or with opposing counsel, as appropriate: Approval of accounts, warrants and return of warrants, approval of subpoenas for administrative proceedings, applications for appointment of special process servers in small claims cases, applications for name change, petitions to release mechanic's liens, applications for entry of administrative agencies' final orders as judg-

ments, petitions to take depositions pursuant to Rule 27(a), master-meter proceedings under D.C. Code §43-541 ete seq. (1981); and requests for issuance of subpoenas under Rule 28-I(b).

(ii) The following matters, if presented on the day the complaint is filed, must be presented to the Judge in Chambers; thereafter, such matters must be presented to the judge assigned to the case: appointment of a special process server, motions with respect to publication of notice requirements, judicial approval of settlements involving minors, motions regarding security for costs, writs of ne exeat, applications to set bonds, and applications for temporary restraining orders.

D.C. CODE SECTION:

§16-501. **Attachment before judgment; affidavit and bond**

(a) This section applies to any civil action in the United States District Court of the District of Columbia or the Superior Court of the District of Columbia, for the recovery of:

(1) specific personal property;

(2) a debt; or

(3) damages for the breach of a contract, express or implied.

(b) In an action specified by subsection (a) of this section, the plaintiff, his agent, or attorney, may file an affidavit as provided by subsections (c) and (d) of this section either at the commencement of the action or pending the action.

(c) The affidavit shall comply with the following requirements:

(1) show the grounds of the plaintiffs' claim;

(2) set forth that plaintiff has a just right to recover what is claimed in his complaint;

(3) where the action is to recover specific personal property, state the nature and, according to affiant's belief, the value of the property and the probable amount of damages to which plaintiff is entitled for the detention thereof;

(4) where the action is to recover a debt, state the amount thereof; and

(5) where the action is to recover damages for breach of a contract set out specifically and in detail, the breach complained of and the actual damage resulting therefrom.

(d) The affidavit shall also state one of the following facts with respect to defendant:

(1) defendant is a foreign corporation or is not a resident of the District, or has

been absent therefrom for at least six months;

(2) he evades the service of ordinary process by concealing himself or temporarily withdrawing himself from the District;

(3) he has removed or is about to remove some or all of his property from the District, so as to defeat just demands against him;

(4) he has assigned, conveyed, disposed of, or secreted, or is about to assign, convey, dispose of, or secrete his property with intent to hinder, delay, or defraud his creditors; or

(5) he fraudulently contracted the debt or incurred the obligation respecting which the action is brought.

(e) Before a writ of attachment and garnishment is issued, the plaintiff shall first file in the clerk's office a bond, executed by himself or his agent, with

security to be approved by the clerk, in twice the amount of his claim, conditioned to make good to the defendant all of costs and damages which he may sustain by reason of the wrongful suing out of the attachment; except that in any case in which the plaintiff states in his affidavit that the value of the specified property to be levied upon is less than the amount of his claim, the court may set the amount of such bond in an amount twice the value of the property being attached, and, notwithstanding the provisions of subsection (f) of this section, only the property so specified shall be levied upon; Provided, That the United States marshal may, in his discretion, when levying upon such property, have the same appraised by an independent appraiser retained by the marshal at the expense of the plaintiff. Any such appraisal shall be made at the time the marshal levies upon the property, and the

appraiser shall accompany him for such purpose. If such appraisal has been made, then only such property as may have a value not exceeding one-half of the amount of the bond shall be attached. In the event the appraised value of the property shall be more than one-half the amount of the bond, the marshal may refuse to execute the writ unless and until the amount of the bond is increased so as to be at least twice the value of the property to be attached.

(f) If the plaintiff files an affidavit and bond as provided by this section, the clerk shall issue a writ of attachment and garnishment, to be levied upon as much of the lands, tenements, goods, chattels, and credits of the defendant as may be necessary to satisfy the claim of the plaintiff.